No. 75-1918

In the Supreme Court of the United States

OCTOBER TERM, 1976

PETER JOSEPH SALERNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was not afforded adequate opportunity for discovery and that an *in camera* conference dealing with a co-defendant should have been transcribed.

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess and distribute cocaine (Count 1), possession of cocaine with intent to distribute (Count 2), and distribution of cocaine (Count 3), in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to concurrent terms of five years' imprisonment on Count 1 and six years' imprisonment on Counts 2 and 3, to be followed by three years' special parole (Pet. App. 14-16). The court of appeals affirmed without opinion (Pet. App. 17).

The evidence showed that on January 8, 1975, undercover police officers Donald Bower and John DeCarlo met

with Ralph Grandinette at the Fort Lauderdale airport (Tr. 31, 81-82).[1] During that meeting, Grandinette stated that he would sell the two officers forty-four ounces of cocaine for $44,000 (Tr. 36, 85). He also stated that the two individuals who then had possession of the cocaine had thirty-five ounces in solid form and an additional nine ounces left from a prior aborted transaction (Tr. 35, 85). It was agreed that Bower and DeCarlo would first purchase the nine ounces, with the larger quantity to be purchased later (Tr. 36, 85).

As agreed, Bower and DeCarlo went to Grandinette's home later that night, where they met petitioner and co-defendant Walter Shaw (Tr. 38, 87-88). Upon Grandinette's instructions, Shaw handed Bower nine plastic bags containing cocaine (Tr. 38, 89). Petitioner and Shaw then discussed the sale of the remaining thirty-five ounces of cocaine with Bower (Tr. 39-40, 90-92). Petitioner explained that the nine ounces of cocaine had been packaged in one-ounce bags for a prior transaction that had not been completed (Tr. 41). He stated that the remaining quantity would be in solid rock form (Tr. 75). Petitioner, Shaw and Grandinette were arrested shortly thereafter (Tr. 42-43).

Petitioner and co-defendant Shaw testified that they were at Grandinette's house during the transaction in order to rob Bower and DeCarlo, rather than to sell narcotics (Tr. 141-147, 152, 168-174, 182-185). Both denied ever possessing or distributing cocaine (Tr. 147, 178, 182). According to petitioner and Shaw, they were arrested before they could carry out the planned robbery (Tr. 146-147, 180-181).

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[1]On August 25, 1975, Grandinette pleaded *nolo contendere* to Count 1 of the indictment, which charged that he had conspired to possess and distribute cocaine, in violation of 21 U.S.C. 846.

1. Petitioner's contention (Pet. 5-7) that he was not afforded adequate opportunity for discovery is directly refuted by the record. At the time of petitioner's arraignment on July 9, 1975, the Magistrate entered an order requiring that all pretrial motions be filed within twenty days of that date and setting trial for August 25, 1975 (Pet. App. 7-8). Also on July 9, 1975, the district court signed a discovery order requiring the government to make available to the defense specified materials to which the defense was entitled (Pet. App. 9-13, 23). Following the arraignment, counsel for the government notified petitioner's counsel that the discovery materials were available in his office and that the attorneys representing the defendants could look at the materials at their convenience (Pet. App. 21). But during the approximately seven-week period following petitioner's arraignment and preceding the beginning of trial, neither petitioner's counsel nor petitioner--who had been released on bond (Pet. App. 21)--availed themselves of the opportunity to inspect the materials.

In these circumstances, the court was wholly justified in denying petitioner's motion, made on the morning of trial, for a continuance for discovery purposes. As the court properly pointed out to petitioner's counsel in denying the motion, "[y]ou can't sit back and not do anything and not come up when you are invited to come look at the discovery and then claim foul" (Pet. App. 23).

2. Petitioner's contention (Pet. 7-9) that he was denied due process and the effective assistance of counsel on appeal because an *in camera* hearing dealing with a co-defendant was not transcribed is similarly without merit. Immediately prior to trial, co-defendant Shaw's counsel moved for leave to withdraw from the case and for a continuance (Pet. App. 23). He also requested a conference

in chambers to permit him to explain to the court the reasons for his motion. The conference, which was held shortly thereafter, was recorded but not transcribed (Pet. App. 24).[2]

Petitioner now speculates that had the *in camera* conference been transcribed he might have learned facts enabling him to raise an entrapment defense. He bases this speculation on the fact that Shaw later testified at trial that he had been an informant for the Florida Department of Law Enforcement. But if petitioner believed that an entrapment defense might be available to him, and that facts disclosed during the *in camera* conference might have buttressed that defense, he could himself have ordered the untranscribed portion of the record. His counsel also could have cross-examined Shaw in an effort to establish the predicate for an entrapment defense. Instead, his counsel did not exercise his right to cross-examine Shaw, who testified in his own defense and, as noted, was convicted with petitioner. Finally, if petitioner believed that he needed a transcript of the *in camera* conference on appeal, he could have placed an order at that time for a transcribed copy of the *in camera* proceedings. Rule 10(b), Fed. R. App. P.[3]

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[2]Although the proceedings at the *in camera* conference were recorded, the Court Reporter Act, 28 U.S.C. 753(b)(1), requires reporters to record only those "proceedings in criminal cases had in open court." See *United States* v. *Jenkins*, 442 F. 2d 429, 438 (C.A. 5).

[3]Petitioner is represented in this Court by retained counsel, as he was in the courts below. *Griffin* v. *Illinois*, 351 U.S. 12, upon which petitioner relies (Pet. 8), requires that indigent defendants be provided with a sufficient record to pursue adequate appellate review. Petitioner is not indigent, and *Griffin* is therefore inapposite.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

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